

Proxy Warfare in the Horn of Africa

Terrorist Organization Al-Shabaab Prospering From the Chaos in the Failed State of Somalia

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Abstract. It's clear that Somalia is the pure definition of a failed state, proof to this is that four years in a row Somalia has held the No. 1 spot in the Failed States Index, indicating the depth of the crisis in the international community's longest running failure. The actual situation can only leave open doors for the "Mujahideen Youth Movement" (Harakat al-Shabaab al-Mujahideen) the most fearsome, Al-Qaeda linked, terrorist group in Somalia to start conflicts with the neighbors which lately invaded Somalia in order to stop the continuous "chicane". But is this intervention lawful under international law? Can this "chicane" qualify for an armed attack? The purpose of this article is threefold. First, it tries to provide a picture of the current conflict in the Horn of Africa and of the events as they unfolded. Second, it will outline the legal rules relating to self-defence in International Law. And third, the legal analysis of the conflict will be performed from the soul perspective of international law, especially in the terms of the rules governing the use of force.

Keywords: Somalia, the United Nations Charter, use of force, self-defence, armed attack, Security Council, non-state actor, Transnational Federal Government, Al-Shabaab, Eritrea.

1. Introduction

Somalia, officially the Somali Republic witch's independence was declared on July 1 1960 is located in the horn of Africa, the eastern-most part of the African continent. For a generation, Somalia has been a byword for the suffering of a failed state and it's regarded as one of the poorest, corrupt¹ and most backward places worldwide. It has been without an effective Government since 1991 when Mohamed Siad Barre's regime collapsed, thus leaving the central Government toppled by clan militias that later turned on each other and plunged the country into chaos and humanitarian catastrophe. From 1991 till now Somali politics are constant in only one thing: inconstancy. Nowadays it is tried by the Transitional Federal Government (TFG) to reorient a peace process that had failed, in one form or another, some 15 times since 1991. The combination of instability and poor governance created a dangerous terrorist organization the Al-Shabaab that wantonly attacks innocent civilians and African peacekeepers, has conducted terrorist attacks against Somalia's neighbors and has actively recruited American citizens.

The focus of the article will be on the situation in the southern Somalia, this being the hotspot of Somali conflict, the situation in northern Somalia being very different. Al-Shabbab., "Mujahideen Youth Movement" (Harakat al-Shabaab al-Mujahideen) occupies most of the south its headquarters being the city port of Kismayo near the Kenyan border. Originally it was the militant wing of the Islamic Courts Union, the group that controlled Somalia prior to the country's invasion by Ethiopian forces. It is said to have as leader since December 2010 Ibrahim "al-Afghani" but this can't last for long as leaders change often. It's designated as a terrorist group by many countries, including the US and the United Kingdom.

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¹ G. Geis, *White-Collar and Corporate Crime. A Documentary and Reference Guide*, Greenwood, 2011, pp. 202-207.

2. Identification of the Applicable Law

Applicable law to the conflict I found to be the *jus ad bellum*, the lawfulness of use of force, or more generally, when force may lawfully be used under international law.

The starting point of the examination of the law applicable is the prohibition of the use of force in Article 2 (4) of the United Nations Charter², “the corner stone” of the UN Charter system³. Article 2 (4) is preceded by Article 2 (3) of the UN Charter which directs Member states to resolve their disputes by peaceful means⁴. However, while States are instructed to seek peaceful coexistence, there are some, very limited situations, under which States are entitled to resort to the use of force under international law.

The provisions of Article 2 are a response to World War II and are accordingly directed to inter-state conflict. It could be said that regarding inter-state conflicts it has succeeded, since 1945 such conflicts have proved to be exceptions and civil wars, proxy or not, have highly outnumbered “traditional” inter-state wars⁵.

Furthermore, the circumstances under which the use of force is lawful will be considered. Chapter VII of the UN Charter which sets out the Security’s Council powers to maintain peace provides two exceptions from the prohibition of the recourse to use force. First, in situations which the Security Council qualifies as: “threat to the peace, breach of the peace, or acts of aggression”⁶ the Council can gradually make recourse to a series of means to constraint the “aggressor”, ultimately resorting to the use of armed force⁷. Article 51⁸ of the UN Charter reserves an inherent right of states to individual or collective self-defence “if an armed attack occurs against a Member of the United Nations”⁹.

In the *Nicaragua* case¹⁰ it was stressed by the Court that the UN Charter by no means covered the whole area of the regulation of the use of force in international relations. It moreover stressed that a definition of the “armed attack” was not provided in the Charter or elsewhere in treaty law, and should therefore be sought in custom. The Court furthermore noted that the criteria of necessity and proportionality were not enshrined in Article 51 of the Charter but formed part of the customary right of self-defence.

Hence, under article 51 of the UN Charter, a state that fall victim of an “armed attack” has a right to defend itself. Thus, states have an inherent right to self-defence however this right is indubitably provisional this meaning that it is valid “until the Security Council has taken measures necessary to maintain international peace and security”.

The exercise of the right of self-defence provides two procedural requirements. First, a *reporting obligation* in accordance with Article 51 “Measures taken by Members in the exercise of this right of self-defence shall be *immediately reported* to the Security Council...”. Second, the “until clause” also found in Article 51 “...until the Security Council has taken measures necessary to maintain international peace and security”, hence the right to self-defence is undoubtedly provisional. In what regards the collective self-defence the Court in the *Nicaragua* case identified additional customary obligations. Thus, two further requirements were added: collective self-defence can only be exercised if there has been a request for support by the State which regards itself as the victim of an armed attack; and the latter State should have publicly

² The Article 2 (4) reads as follows: “All Members shall refrain in their international relations from the threat or use of force against the territorial integrity or political independence of any state, or in any other manner inconsistent with the Purpose of the United Nations”. By this provision the founding Members of the United Nations extended the outlawry of war introduced by the Kellogg-Briand Pact to small-scale uses of force, effectively sanctioning armed reprisals short of war and threats of the use of force.

³ I. Brownlie, *Principles of Public International Law*, Oxford University Press, New York, 2003 p. 699.

⁴ Another idea that rises from the provisions of Article 2 is that one states territory cannot be legally occupied by another through resort to force and cannot be legally acquired.

⁵ C. Gray, *International Law and the Use of Force*, 2nd Edition, Oxford University Press, New York, 2004, pp. 6-22.

⁶ Article 39 of the UN Charter.

⁷ R. Miga-Beliu, *Drept Internațional Public*, Volume II, C.H. Beck, Bucharest, 2008, p. 159.

⁸ Article 51 states as follows: Nothing in the present Charter shall impair the inherent right of individual or collective self-defence if an armed attack occurs against a Member of the United Nations, until the Security Council has taken measures necessary to maintain international peace and security. Measures taken by Members in the exercise of this right of self-defence shall be immediately reported to the Security Council and shall not in any way affect the authority and responsibility of the Security Council under the present Charter to take at any time such action as it deems necessary in order to maintain or restore international peace and security.

⁹ I. Brownlie, *International Law and the Use of Force by States*, Calderon Press, New York, 1963, pp. 275-280.

¹⁰ *Nicaragua* case paragraph 176.

declared itself to have been attacked¹¹.

The same Court stressed that in order to be lawful the response in self-defence must finally abide to two substantive criteria, which are the customary criterions necessity and proportionality. It is generally accepted in customary practice and legal doctrine that the two principles essentially imply that measures should be geared towards the halting of an “armed attack” and should not exceed this goal, otherwise it will be qualified as a reprisal¹² and such reprisals involving the use of force in time of peace are unlawful¹³.

A further and particularly difficult issue of interpretation relates to the phrase "armed attack" in Article 51. Thus, with the above mentioned is clear that the right to self-defence under Article 51 only applies if an armed attack occurs. Hence, in order to find out if the use of force in response is permitted is key to see whether there has been an “armed attack” on the State that is responding with force by the State, or non-state actor, against which force is used. Professor Antonio Cassese in his 1989 article outlined a few conditions of the “armed attack” coming from terrorists: first, he pointed out the “very serious attack” criterion which meant that an “armed attack” in this context means a very serious attack either on the territory of the injured State or on its agents or citizens while at home or abroad¹⁴ (in other State or in international waters or airspace); second, in order for a terrorist act to constitute an “armed attack” such an attack must form part of *a consistent pattern of violent terrorist actions rather than just being isolated or sporadic aggressions*.

But in order to combat terrorism is the expansion of self-defense to the inclusion of ‘terrorist attacks’ as rising to the level of “armed attacks” the best solution? Won’t this only leave open doors to arbitrary?

3. The Facts

The events that elicited the Kenyan intervention are primarily three. One of the kidnapping took place on October 1, 2011 on the small island of Manda in the Lamu archipelago, Kenya. From the beachfront of her home, French national, Mrs. Marie Dedieu's a 66 year old, who was a wheelchair-user and had to take regular medication for cancer and heart problems, was taken by an armed group. After a while diplomats were told of Marie Dedieu's death by contacts through whom they had been negotiating her release¹⁵.

In September, British nationals Briton David Tebbutt was killed and his wife Judith abducted from a luxury resort of Kiwayu on the Kenyan coast.

On October 13 António Guterres, the UN High Commissioner for Refugees voiced shock and indignation at the violent abduction from the Dadaab refugee camps in Kenya¹⁶ of two female aid workers and the shooting of their driver. He declared that “These MSF (Médecins Sans Frontières) colleagues were working to rescue lives. It is wholly unacceptable that they should be made targets for kidnap”. The two MSF staff members were abducted from the Ifo extension area of the camps at around 1:20 p.m. local time. The Kenyan police said that the hostage-takers are suspected to be members of the Shabaab. Leo Nyongesa, regional police chief declared that "Two aid workers of Spanish nationality have been kidnapped by the Shabab, they are working for MSF".¹⁷ The aid workers' Kenyan driver was shot in the neck. After this last incident, Kenya sealed the border with Somalia and mobilized the military and the police to search for the hostages, according to the press reports.

The Shabaab denied the recent kidnappings and believes that the kidnappings are being used as a pretext for the incursion, a convenient conclusion and an easy sell to the public. In a press release responding to the Kenyan invasion the group said: “Harakat al Shabaab al Mujahideen hereby categorically denies all charges pertaining to the kidnapping of tourists and aid workers from inside Kenya”. “The allegations put forward by the Kenyan authorities with regard to the recent kidnappings are, at best, unfounded and not substantiated

¹¹ T. Ruys, “Armed attack” and Article 51 of the UN Charter: Customary Law and Practice, p. 83. E.g. *Nicaragua* case paragraph 195, 199 and 211.

¹² T. Ruys, pp. 91-94.

¹³ ICJ *Nuclear Weapons* case Advisory opinion paragraph 46.

¹⁴ A. Cassese, *The International Community’s legal Response to Terrorism*, 38 *Int’l & Comp. L.Q.* 558-596 (1989).

¹⁵ BBC “French hostage Marie Dedieu held in Somalia dies” (<http://www.bbc.co.uk/news/world-africa-15365469>).

¹⁶ The Dadaab refugee complex is the world’s largest refugee camp and currently hosts 463,739 refugees, most of them Somali.

¹⁷ The UN News Center “Senior UN official voices indignation as aid workers are abducted in Kenya”

(<http://www.un.org/apps/news/story.asp?NewsID=40040&Cr=kenya&Cr1=>).

with any verifiable evidence.” Al-Shabaab is usually notorious for claiming responsibility for their actions, such as the October 4 truck bomb in Mogadishu which claimed the lives of more than 70 and another 150 people were wounded. However, they have not done so for these kidnappings, a cause for doubt on Kenya’s assertions. Also, these are not typical al-Shabaab tactics.

4. Operation Linda Nchi¹⁸ against the Shabaab

On October 16 Kenyan Government launched the operation Linda Nchi (protect the nation) against the terrorist organization Al-Shabaab now based in Kismayo. Al-Shabaab’s continuous chicanery didn’t raise such a Kenyan response till now even though many kidnappings have taken place before without making the Shabaab automatic suspects.

The majority of international reactions are in support of the Kenyan intervention. E.g. the Eritrean envoy in Nairobi, Beyene Russom, declared that his government does not object to the ongoing intervention in Somalia by the Kenya Defence Forces against the Shabaab insurgents. The Eritrean official also denied funneling weapons to Al-Shabaab and blamed arch-rival Addis Ababa for peddling rumors about its support for the terrorist organization¹⁹. On October 30 in Australia, the South African and Rwandese Presidents confirmed Kenya’s action in Somalia against the Shabaab Islamists and asked the international community to show more commitment to the fight against terrorism in Africa’s Horn and implicitly the group. President Paul Kagame of Rwanda said “Rwanda is ready and willing to provide any support Kenya will require to win the war against the Al-Shabaab. Make the request and Rwanda is ready to chip in”. On November 15 Israel made a deal to help fight Somalia’s Al-Shabaab.

Because one of the kidnaped was a French national, France is offering logistics support in the war, Colonel Thierry Burkhard said on October 25 that French planes would transport military equipment to Kenyan soldiers near the Somali border thus offering a “limited in scope” operation.

Besides, the drone strikes on Islamist militants and the use of private contractors the US is not (yet) waging war to the Al-Qaeda linked terrorist organization.

Kenya informed the Security Council right away. However, this doesn’t necessarily mean that there will be a debate or a resolution. The Security Council has a big role provided by Article 51 but this does not require the Council to pronounce on the legality of any claim to self-defence²⁰. And even if there will be a resolution or statement regarding the conflict most probably it won’t attribute any responsibility whatsoever.

Kenya responded by invading Somalia, thereby engaging Article 2(4), and requiring a justification under Article 51. Kenya intervenes in Somalia, in the south where Al-Shabaab has presence, without the invitation of the TFG, even though consent was later provided, hence, is important to point out that the Operation doesn’t qualify for collective self-defence but for individual self-defence. And is the response lawful? As pointed out in the *Nicaragua* case Governments may invite outside help²¹, Kenya wasn’t officially invited. However, the Court was very brief to this subject, probably due to its complexity. Professor Ian Brownlie points out in his 1963 writing²² that “states may lawfully confer by treaty a right to intervene by the use of armed force within the territorial or other legally permitted limits of their jurisdiction”. He also points that sometimes when “consent is alleged some difficulty may be experienced in determining whether it is voluntary, and what degree of pressure may be regarded as vitiating such consent”.

Cambridge Professor Christine Gray notes in her work “International Law and the Use of Force” that the duty of non-intervention and the right of states to choose its political, economic, social and cultural systems have brought with them the duty not to intervene to help a government in a civil war. The major restrictions are the existence of a civil war and that control of the state’s territory was divided between warring parties.²³

¹⁸ Swahili for “Protect the Nation”.

¹⁹ Reuters “Eritrea is not Kenya’s enemy, says envoy” November 12, 2011.

²⁰ C. Gray, p. 100;

²¹ The principle of non-intervention “forbids all states or groups of states to intervene directly or indirectly in internal or external affairs of other states. A prohibited intervention must accordingly be one bearing on matters in which each state is permitted, by the principle of state sovereignty, to decide freely”. *Nicaragua case* paragraph 205.

²² I. Brownlie, *Use of Force*..., p. 317.

²³ C. Gray, pp. 59-94.

At a glance, the above mentioned apply to Al-Shabaab, but determining the type of conflict in Somalia and if the Shabaab can be considered a party is not the scope of this article. However, if there has been outside subversion against the government, help becomes permissible. Eritrea has been accused by finding of the Somalia/Eritrea Monitoring Group report of 18 July 2011 (S/2011/433)²⁴ and was sanctioned by the Security Council Resolution 2023 (2011) hence, this could be characterized as outside subversion. In a teleconference before the Security Council which was deciding upon sanctions over Eritrea, Sheikh Sharif Sheikh Ahmed, President of the TFG, said his people had been suffering from terrorism and that his Government had tried to reconcile with those groups, but interference by the Eritrean authorities had prevented that. Al-Shabaab and Al-Qaida had the support of the Eritrean Government by sea, land and air²⁵.

For what matters, there is help provided by the PSC through AMISOM. The United Nations envoy for Somalia, Augustine Mahiga, has stressed in Nairobi the need to bring the strength of the African Union peacekeeping force to the 12,000 troops mandated by the SC he also added that Al Shabaab insurgents were increasingly resorting to unconventional warfare. Furthermore, when asked about the presence of Kenyan troops in Somalia, Mr. Mahiga said the decision to deploy Kenyan forces was a bilateral one between the two countries and was in no way related to the deployment of AMISOM.

The alleged kidnappings that were the vital catalyst for the Kenyan operation against the Shabaab seem to be very similar to the type of conduct which, according to the Court's ruling in the *Nicaragua* case, does not justify recourse to an armed response.

As noted in the chapter above, within the international community, the Kenyan operation is widely qualified as self-defence, the reaction by states has generally been that Kenya was entitled, in principle, to act in self-defence. However, Human Rights Organizations such as Human Rights Watch raise concerns regarding possible violations of humanitarian law and human rights law by Kenyan armed forces²⁶.

If we would assume that Kenya has the right to self-defence due to the above mentioned kidnappings, the further question arises as to the precise form of the action that constitutes an appropriate response. Even the most unaware reader can easily see the relevance of proportionality furthermore, in the context of self-defence. But how is proportionality measured? On the one hand, a quantitative proportionality is required in order to conform to the quantitative features of the attack (such as the scale of the action and the type of weapons used) and on the other, a qualitative proportionality is needed in order to establish whether the means employed are appropriate in relation to the aim sought by the response²⁷.

It is important to be clear against what is the response measured. Two possibilities emerge here²⁸. Thus, the first possibility is to measure the response in proportion to the events preceding it, with particular reference to the quantitative test of the armed attack, whilst the second possibility is to measure the response in relation to the threat that is being faced and the means necessary to repel the attack.

5. Conclusion

The legal analysis of the conflict from the soul perspective of international law, especially in the terms of the rules governing the use of force in international law is even more complicated due to the mutations which occurred in respect to certain concepts of international law and their interpretation after the terrorist attacks of September 11, 2001. The "fight against terrorism" has transformed international affairs to a significant degree and hence many scholars regard 9/11 as a turning point in the history of international law, similar to those of World War I, from which the League of Nations emerged, and World War II, after which the United Nations system was born.

²⁴ Eritrea has continued providing political, financial, training and logistical support to armed opposition groups, including Al-Shabaab, engaged in undermining peace, security and stability in Somalia and the region". Security Council Resolution 2023 (2011).

²⁵ Moses Wetangula, Minister for Foreign Affairs of Kenya, also expressed his concern over Eritrean aid to the Shabaab.

²⁶ On a letter to Yusuf Haji, the Kenyan Minister of State for Defence, Daniel Bekele, Director of the HRW Africa Division, expressed concerns about possible violations of international humanitarian and human rights law by Kenyan armed forces during three incidents connected to Operation Linda Nchi (for the full text of the letter access: <http://www.hrw.org/news/2011/11/18/kenya-human-rights-concerns-operation-linda-nchi>).

²⁷ E. Cannizzaro, Contextualizing proportionality: jus ad bellum and jus in bello in the Lebanese war, *International Review of the Red Cross*, Volume 88 Number 864 December 2006, p. 783.

²⁸ N. Lubell, *Extraterritorial use of force against non-state actors*, Oxford University Press, New York, 2010, p. 64.

But are these kidnappings an armed attack or they only simply represent a crime, for which the criminals and their co-conspirators can be brought to court? Critical questions remain as to whether the alleged kidnappings of foreigners from Kenyan territory gave rise to an “armed attack” under Art. 51 and whether the Kenyan measures met the requirements of necessity and proportionality.

Taking into consideration all mentioned above, in conclusion, I strongly reaffirm the objection brought by Italian International Law Professor and Jurist Antonio Cassese which believed that “Sporadic or minor attacks do not warrant such a serious and conspicuous response as the use of force in self-defence”, this past criticism can easily be evoked here. I believe that Kenya choose this way of acting counting on France and US support which both support a “Low” self-defence threshold. In my opinion the Kenyan intervention in southern Somalia would have been “less unlawful” or “more lawful” if it would have played the collective self-defence card thus saying that it is helping the government respond to prior intervention by other states, such as that of Eritrea, and for fighting international terrorism.

6. Acknowledgements

I wish to thank my colleague Cristian Capisizu for the productive debate on the subject.

7. References

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